Gifford v Strang and the new landscape for recovery for psychiatric injury in Australia

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Gifford v Strang Patrick Stevedoring Pty Ltd *was the third recent High Court case dealing with liability for psychiatric injuries. This article examines that decision, with references to the other two cases* ***Tame v New South Wales*** *and* ***Annetts v Australian Stations Pty Ltd****. It places these judgments in the context of the recommendations concerning mental harm in the recent Ipp Panel's review of negligence and subsequent tort reform legislation. It will be seen that far from removing uncertainty and inconsistencies, Australian law concerning psychiatric injury has never been more divided.*

1. Introduction

In *Gifford v Strang Patrick Stevedoring Pty Ltd* [1] the High Court completed a triumvirate of cases dealing with psychiatric injury claims, which also included the dual case of *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*.[2] The cases spanned the two types of claim generally encountered in relation to this form of injury. *Tame* involved a so-called 'primary victim' scenario, wherein a plaintiff alleges that he or she has suffered psychiatric injury as the result of being the subject of the defendant's conduct. By contrast, *Annetts* and *Gifford* both involved 'secondary victim' scenarios, wherein a plaintiff alleges that he or she has suffered psychiatric injury as the result of the death, injury or imperilment of a third person. Together, the three cases provided the opportunity for the court to settle an area of common law which for long has been bristling with contentious issues and to provide guidance for lower courts which have for some time struggled to divine the law from ageing and imperfect High Court authorities, such as the 1984 decision in *Jaensch v Coffey*[3] and the 1970 decision in *Mount Isa Mines Ltd v Pusey*.[4] In particular, the cases provided the High Court with the opportunity to decide whether to adopt the strict primary/secondary victim dichotomy approach to psychiatric injury claims, with arbitrary control mechanisms governing the latter, along the lines of the current approach of the House of Lords, or to adopt the more flexible attitude that has found favour with a number of judges over the years.[5]

It would be misleading, however, to discuss the post-*Gifford* psychiatric injury landscape without some mention of recent legislative change in the wake of the Ipp Panel's review of negligence as it applied to personal injury claims.[6] This review was constituted by the Federal Government in response to fears of rapidly rising insurance costs, which threatened the viability of a variety of organisations and activities

ranging from surf lifesavers to pony rides and church fetes. The panel made a number of recommendations concerning mental harm, which have been enacted to varying degrees by most but not all Australian jurisdictions.

This article comprises a number of sections. It commences with a brief consideration of the dual case *Tame* and *Annetts*, which has already been the subject of an earlier note.[7] It then examines the decision in *Gifford* in detail, before discussing the common law landscape that has now emerged in Australia. It concludes with an outline of the Ipp Panel's recommendations concerning mental harm and the subsequent legislative tort reform of the area.

2. *Tame* and *Annetts*: a brief revisit

Tame was the case concerning a plaintiff who was involved in a motor vehicle accident with a drunk driver. By mistake the investigating police officer entered the same high blood alcohol reading against both drivers on the Police Accident Report. Although the mistake was quickly identified and corrected, the plaintiff alleged that she had suffered psychiatric injury after learning of the error, based on the fear that other people may have been led to think that she had been responsible for the accident.

By contrast, *Annetts* involved two parents who entrusted their 16-year-old son to the care of the defendant, the owner and operator of a large cattle station in Western Australia, on the basis of an express assurance that he would be working as a jackeroo in supervised surroundings. Contrary to the assurance, the boy was posted to a lonely station outpost. The boy decamped and became lost in the desert. An extensive search was conducted, with the boy's parents travelling several times from their home in New South Wales. Several months later the parents were contacted by police by telephone and informed that the boy's remains had been found.

Although the cases were argued separately, the High Court delivered the judgments together. In relation to *Tame*, there was a reiteration of the proposition that a plaintiff in psychiatric injury claims is required to show a 'recognisable psychiatric illness' as the requisite form of damage.[8] However, there was less agreement concerning other issues. Several judges made observations concerning the determination of the existence of a duty of care in such cases. For example, Gleeson CJ stressed the importance of any foreseeability of harm being *reasonable*. With evidence of Mrs Tame's special vulnerability, it was not reasonable to expect the

police officer to have had her in his contemplation as a person who could be affected by his conduct.[9] By contrast, Gaudron J suggested that it was important to identify a relationship between plaintiff and defendant that makes the former someone who ought to have been in contemplation of the latter as a person closely and directly affected by the latter's acts.[10] Several judges thought that coherency in the law was an important reason for denying the existence of a duty of care in the circumstances. As someone under a duty to fully and properly investigate an incident, the police officer could hardly owe a subject of that investigation a duty to avoid causing her stress.[11] Further, since the matter reflected on Mrs Tame's reputation, the cause of action, if any, was more properly framed in defamation. Recognition of a duty of care in the circumstances would encroach upon this settled area.[12]

An important matter upon which their Honours disagreed was the proper approach to the concept of 'normal' (or 'ordinary') 'fortitude'. This concept reflects the notion that the plaintiff's reaction ought in some way to be judged against the standard of a person of 'normal' susceptibility. Views differed not only in relation to the meaning of 'normal fortitude', but also in relation to its appropriate role. As to the meaning of the term, Gleeson CJ noted that the phrase did not reflect the deluded view that such a person existed, but instead denoted the view that some persons have such a degree of susceptibility that their reactions are beyond the limits of reasonable foreseeability.[13] That was the case here, with the medical evidence showing that Mrs Tame was particularly vulnerable.[14] Other judges seemed to take a more objective approach in the sense of postulating how a hypothetical person of notional normal fortitude would have reacted in the circumstances.

As to the proper role of the concept, several judges saw reasonable foreseeability of the risk of a person of normal fortitude suffering psychiatric injury in the circumstances as a factor in determining whether a duty of care arose.[15] By contrast, Gummow and Kirby JJ saw it as relevant to the question of whether the duty was breached.[16] Hayne J saw normal fortitude as an important legal response to the cases entitled to recovery, since the medical response to which type of injury should be compensable would otherwise be too broad.[17] Only McHugh and Callinan JJ expressly regarded 'normal fortitude' as a precondition to recovery,[18] although it may be that Hayne J in linking the concept to the kind of damage, which is an essential factor in all cases of psychiatric injury, also effectively elevated the concept to prerequisite status.

It seems that *Annetts* did not prove as good a vehicle for examination of the principles relevant to a secondary victim scenario as may have been first thought. Prima facie the case involved problematic features such as a psychiatric injury resulting from a dawning realisation rather than a sudden affront to the senses,

distant plaintiffs learning about the imperilment and ultimate death of a loved one through third party communication rather than direct perception, and whether a 'normal' parent would have suffered psychiatric injury in the circumstances. The Full Court of the Supreme Court of Western Australia took a restrictive approach to these matters, upholding a trial judge's decision that there was no cause of action stated on the assumed facts on the grounds of an absence of a sudden shock or direct perception, and the view that a normal parent who had a dawning realisation that his or her 16-year-old child was lost would not suffer psychiatric injury.

However, on appeal to the High Court, it was held that the defendant's assurances to the plaintiffs that their son would be safe and supervised was an important factor in finding that a duty to exercise care had arisen. As such, the case did not turn on the need for a sudden shock or direct perception. Nevertheless, most of the judges took the opportunity to express obiter the view that in Australia neither sudden shock nor direct perception was to be regarded as a precondition of liability; instead, they were no more than factors relevant to, for example, reasonable foreseeability in the circumstances.[19] Only Callinan J was of the opinion that shock and direct perception were essential elements in secondary victim claims,[20] although his Honour interpreted 'shock' and 'perception' in a somewhat generous fashion by holding that hearing news of the loss of their son via the telephone calls came 'out of the blue' and as 'thunderclaps' and was therefore sufficient.

One matter that attracted a unanimous conclusion was the anticipated reaction of a 'normal parent' in such circumstances. In approaching this question, the court had before it the views of the members of the High Court of the 1930s when deciding *Chester v Waverley Corporation*.[21] In that case four members of the court thought that a 'normal' mother who saw the dead body of her child being dragged from a water-filled trench after going missing for several hours would not suffer psychological consequences. For one judge this was because death was not an infrequent event.[22] Only Evatt J dissented against the 'indurate-hearted' mother fashioned by the majority. Likewise the judges in *Annetts* adopted a more realistic and compassionate attitude to the expected reaction of 'normal' parents, overruling the 'indurate heart' contemplated by the Full Court of the Supreme Court of Western Australia. As Callinan J observed, the circumstances of the disappearance and death, and their communication, 'could well, and reasonably foreseeably inflict psychiatric harm upon stoic parents, let alone parents of only ordinary fortitude'.[23] In the end result the case was remitted for trial of the action.

3. *Gifford v Strang*

If *Annetts* ultimately proved to be an imperfect opportunity to explore the law governing 'secondary victim' claims, the same could not be said of the appeals in *Gifford*. Indeed, it was said of *Gifford* that 'a more suitable vehicle for the grant of special leave in a nervous shock case could hardly be found'.[24]

The defendant-respondent was a stevedoring company which employed a man who was crushed to death by a forklift. Negligence on the part of the forklift driver, who was also employed by the defendant, was not in issue. The deceased man's three children, aged 19, 17 and 14, were later informed of the accident. Subsequently, the three children and their mother all claimed to have suffered psychiatric injury in consequence of learning about what had happened to the deceased. At trial the mother's claim was dismissed on the ground that she could not demonstrate that she had suffered psychiatric injury, but had merely been affected by normal grief of a kind that was not regarded as being compensable. The claims of the children were dismissed on the ground that the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) s 4(1)(b) provided that the defendant was under no liability for the 'nervous shock' suffered by the children because their father had not been killed, injured or put in peril within their sight or hearing. On appeal, the NSW Court of Appeal regarded the decision based on s 4(1)(b) as incorrect. Nevertheless, it dismissed the children's appeals on the basis that because they had merely been told about the incident and did not directly perceive either the accident or its aftermath, there could be no duty of care at common law.[25] On appeal to the High Court, the respondent sought to have the appeals dismissed on the grounds that no duty of care arose at common law and on the basis of s 4(1)(b) (as accepted by the trial judge). The appellants countered the latter by arguing that s 4(1)(b) had been displaced by the Workers Compensation Act 1987 (NSW) s 151P, which purportedly conferred a right of action for psychiatric injuries resulting from workplace accidents on workers and families of workers.

(a) Section 4(1) of the Law Reform Act 1944

This section was still in effect when the facts in *Gifford* took place. By the time the appeals reached the High Court, the section had been replaced by the Civil Liability Act 2002 (NSW) s 30. The section relevantly provided as follows:

> (1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril shall

extend to include liability for the injury arising wholly or in part for mental or nervous shock sustained by:

(a) a parent or the husband or wife of the person so killed, injured or put in peril; or

(b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family.

As McHugh J pointed out, when the section was enacted it was intended as a beneficial provision expanding the ability of close family members to recover for nervous shock, being a response to the perceived inadequacies in the common law as it then stood, following the decisions of the High Court and House of Lords respectively in *Chester v Waverley Corporation*[26] and *Bourhill v Young*,[27] by removing the need for a family member to show the existence of a duty to the family member or that psychiatric injury to that person was reasonably foreseeable. The legislative history[28] shows that while the section was the result of a parliamentary compromise as to the desirable extent of reform of the law, it was intended to confer rather than take away rights. Apart from anything else, this is made clear by the use of the words 'shall extend to include liability' of a certain kind in certain circumstances, which was difficult to reconcile with a legislative intention comprehensively to define the scope of liability to the exclusion of the common law.[29]

That conclusion was in no way affected by the Workers Compensation Act s 151P. That section was not an independent source of rights. It was clear from the other sections in this statute, such as ss 151 and 151E, that the common law was affirmed in the case of workplace injuries except to the extent that was otherwise provided in s 151P. In other words, rather than conferring rights, s 151P operated to limit the right to recover damages in an action for psychiatric injuries resulting from a workplace accident to claims by injured workers and members of their close families.[30]

(b) The common law

That then left the question whether a duty of care arose at common law. For several of the judges, the answer involved reaffirming many of the obiter observations that they had made in *Annetts*.

Gleeson CJ held that the proposition stated by the Court of Appeal and relied upon by the respondent, that there could be no liability at common law for mental injury to a person who was told about an accident

involving a loved one and who did not actually perceive the incident or its aftermath, was inconsistent with the reasoning of the High Court in *Tame-Annetts* and could not stand with the actual decision in *Annetts*. The need for a sudden shock or direct perception of an incident or its aftermath was therefore to be rejected.[31] However, his Honour repeated the view he had expressed in *Tame-Annetts* that the existence of a duty of care required more than mere reasonable foreseeability of psychiatric injury, in the sense of it being not far-fetched or fanciful. Such would lead to the imposition of an unreasonable burden upon freedom of action and personal security if reasonable foreseeability were to involve no more than mere predictability. Instead, his Honour believed that the central issue was whether it was reasonable to require the defendant to have in contemplation the risk of this psychiatric injury to the plaintiff and to take reasonable care to guard against such injury.[32] Relevant to deciding this issue was the burden that would be placed upon those in the position of the defendant by requiring them to anticipate and guard against harm of that kind. Gleeson CJ considered that it was reasonable for an employer to have in contemplation, not only an employee, but also his or her children, when considering the risk of psychiatric injury resulting from the employer's conduct, it not being beyond the 'common experience of mankind' for a child to suffer psychiatric injury in consequence of learning of a terrible and fatal accident involving his or her father. His Honour stated that:

> Not all children have a close and intimate relationship with their parents; and it may be that, even when parents are killed in sudden and tragic circumstances, most grieving children do not suffer psychiatric injury. However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. When there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.[33]

It was noted above that in *Tame-Annetts* McHugh J refrained from expressing any view in relation to the validity of limiting liability for psychiatric injury to cases involving sudden shock or where the plaintiff directly perceived a distressing event or its immediate aftermath, on the grounds that such matters were not directly an issue in that case. In *Gifford*, however, his Honour noted that the other members of the court had held in *Annetts* that the common law in Australia did not recognise such limits and that for that reason the Court of Appeal was in error in this case. Addressing the question in this case, his Honour thought it was so common and widely known a phenomenon that those who have a close and loving relationship with a person

who is killed or injured often suffer psychiatric injury on learning of the injury or death or observing the suffering of that person, that a wrongdoer must have it in mind when contemplating a course of action that could affect others. That sufficiently constituted those in a close and loving relationship with the person harmed as the neighbours of a wrongdoer and therefore as persons who were owed a duty of care.[34] However, he stressed that it was the closeness and affection of the relationship rather than the legal status of the relationship that was relevant in determining whether a duty was owed to the person suffering psychiatric harm:

> The relationship between two friends who have lived together for many years may be closer and more loving than that of two siblings. There is no policy justification for preventing a claim for nervous shock by a person who was not a family member but who has a close and loving relationship with the person harmed or put in peril. In a claim for nervous shock at common law, the reasonable foresight of the defendant extends to all those with whom the victim has or had a close and loving relationship.[35]

His Honour saw little point in wasting curial resources by requiring persons who are related as, for example, spouses, siblings, de facto partners or engaged couples, to prove the closeness and loving nature of the relationship between them. Instead the administration of justice was better served by a fixed rule that persons in such relationships, despite the possibility of estrangement, must *always* be in the contemplation of a wrongdoer as a person who may be affected by his or her conduct. Further, the wrongdoer must *always* have in mind that any person may be able to establish a close and loving relationship with the person harmed and, therefore, constitute a neighbour who is owed a duty of care. Nevertheless, McHugh J did not regard a close and loving relationship as being a necessary condition of the existence of a duty of care. In other cases an association with the primary victim or being in their presence could be regarded as being sufficient to give rise to a duty to take reasonable care to protect a person from suffering psychiatric harm. This was the case where the person suffering psychiatric harm saw or heard the accident or its aftermath. Accordingly, McHugh J recognised that a duty to take care could exist even though the primary victim and the person suffering psychiatric harm had no pre-existing relationship. He saw this as consistent with the view of Gummow and Kirby JJ in *Tame-Annetts* that:

> Distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable

> foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness. But they are not themselves decisive of liability.[36]

In the present case, the relationship between the children and their father meant that the defendant ought to have had in mind that any harm caused to its employee carried the risk that it could cause psychiatric harm to any of his children who might thereafter learn of his death.[37]

Gummow and Kirby JJ thought that psychiatric injury to children of an employee was a consequence which the defendant employer, judged by the standard of a reasonable person, ought to have foreseen. Moreover, they considered that in attempting to define the scope of liability in negligence it was useful to identify the interest which was sufficient to attract protection of the law in any given field.[38] As was noted in *Tame-Annetts*, Australian law sought to protect in an appropriate case the plaintiff's freedom from serious mental harm that manifested itself in a recognisable psychiatric illness. More specifically, the law placed particular emphasis on the protection of the young from serious harm. Both general law and contemporary statute law had treated the relationship between parent and child as a primary means by which to secure the public interest in the nurturing of the young.[39] Their Honours noted that the case shared important characteristics with the relationship in *Annetts*, where it was not disputed that the relationship of parent and child would be sufficient to import a duty of care on the part of the defendant to avoid causing psychiatric illness to the parents as a consequence of the wrongful death of their child. The plaintiffs here had no way of protecting themselves against the risk of psychiatric harm that transpired. The defendant controlled the conditions under which the deceased worked and had a significant and perhaps exclusive degree of control over the risk of harm to him and of the risk of consequent psychiatric harm to his children. The defendant's control of the risk of harm was direct in both the legal and practical sense, rather than remote. There was no inconsistency between the existence of a duty of care to the children and the legitimate pursuit by the defendant of its business interests, since the duty of care to the children would at most be co-extensive with the tortious and contractual duties that it owed the deceased directly as his employer.[40]

Hayne J reiterated the view that he expressed in *Tame-Annetts*,[41] that if liability for psychiatric injury embraced all conditions that psychiatric medicine classified as a form of 'psychiatric injury', it would be necessary to develop one or more new control devices in substitution for those which had been rejected by the High Court in *Tame-Annetts*, ie, normal fortitude, sudden shock and direct perception. Such new control mechanisms might become evident as knowledge about the causes of psychiatric injury and the effect of

traumatic events increased. That said, Hayne J thought that following *Tame-Annetts* he was bound to conclude that an employer owed a duty to take reasonable care to avoid psychiatric injury to at least an employee's children. Like *Annetts*, the closeness of the pre-existing relationships between the three parties -- employee, employer and children -- coupled with the fact that it was reasonably foreseeable that the children might suffer psychiatric injury on learning of their father's accidental death or serious injury at work, required the conclusion that a duty to take reasonable care to avoid psychiatric injury was owed by an employer to the employee's children. Moreover, it was not relevant that the three children were not living with the deceased, that two of the children were in the workforce or that the oldest of the three was an adult. The conclusion that a duty of care was owed flowed from the combination of the facts that the defendant as employer of the plaintiffs' father controlled the work that he did, and how and where he did it, thus requiring the defendant as employer to take reasonable care and to ensure that reasonable care was taken to avoid harm to employees, and that the employer could reasonably foresee that the children of the employee might suffer psychiatric injury if the employee were killed or seriously injured at work.[42]

Callinan J adhered to what he had said in *Tame-Annetts*.[43] In that case his Honour had summarised the relevant principles as follows:

> There must have occurred a shocking event. The claimant must have actually witnessed it, or observed its immediate aftermath or have had the fact of it communicated to him or her, as soon as reasonably practicable, and before he or she has or should reasonably have reached a settled state of mind about it. The communicator will not be liable unless he or she had the intention to cause psychiatric injury, and was not otherwise legally liable for the shocking event. A person making the communication and the performance of a legal or moral duty will not be liable for making the communication. The event must be such as to be likely to cause psychiatric injury to a person of normal fortitude. The likelihood of psychiatric injury to a person of normal fortitude must be foreseeable. There need to exist special or close relationships between the tortfeasor, the claimant and the primary victim. Those relationships may exist between the employer and employee and co-employees and relationships of the kind here in which assurance was sought, and given, and dependence and reliance accordingly ensued. Other relationships may give rise to liability in future cases. A true psychiatric injury directly attributable to the nervous shock must have been suffered.[44]

Accordingly the case was remitted to the NSW District Court to determine whether there had been a breach of the duty of care to the plaintiffs' father and whether in the circumstances the plaintiffs had suffered psychiatric injury as opposed to mere emotional distress or ordinary grief.

4. The current common law landscape in Australia

Before the recent three decisions of the High Court, the task of lower courts was likened by one judge to navigating 'uncertain seas ... by the charts of the leading cases in the High Court',[45] which were described as 'maps [which] are authoritative, yet ... somewhat dated'.[46] The decisions in *Tame-Annetts* and *Gifford* may have served to update the maps and given clear direction in some respects, but those hoping for a removal of all uncertainty in this long troubling area will have been disappointed. Indeed, there are still areas that might rightly be marked with the customary caution: 'Here there be dragons!' What then is the current position concerning psychiatric injury claims at common law in Australia?

There is no doubt that in order to recover, a plaintiff must show a recognisable psychiatric illness. This requirement not only serves as a description of the damage regarded as being worthy of compensation, but also an important limitation on the claims that might be brought.

All of the High Court judges saw a role for normal fortitude. Notions of the plaintiff's expected conformity to a standard of 'normal susceptibility' may be traced back as far as cases such as *Dulieu v White & Sons* and Phillimore J's 'ideal *vir constans*'.[47] In the High Court, it appeared in *Chester* in the form of the expectations of a 'normal mother'; and in the House of Lords in *Bourhill v Young*, Lord Wright referred to 'normal fortitude' and Lord Porter to 'customary phlegm' as being a relevant consideration when determining reasonable foreseeability.[48] In *Page v Smith*,[49] however, a majority of the Law Lords saw normal fortitude as a precondition to recovery only in secondary victim cases.

In *Tame-Annetts* only McHugh and Callinan JJ and possibly Hayne J may be seen to have favoured the concept being a precondition to recovery. The other judges saw the concept as merely being a factor that informs the assessment of reasonable foreseeability of psychiatric injury in the circumstances. As Gummow and Kirby JJ pointed out in *Tame-Annetts*: 'It may be that, in some circumstances, the risk of a recognisable psychiatric illness to a person who falls outside the notion of "normal fortitude" is nonetheless not far-fetched or fanciful.'[50] Moreover, while Gummow and Kirby JJ prefer foreseeability of normal fortitude as

being relevant to breach,[51] it would seem that the other five judges supported the more traditional analysis of it being a matter affecting duty of care.

There would also seem to be differences in the meaning of the term, which directly impacts upon the way that it is applied in practice. The term is without medical legitimacy: every person has his or her own breaking point. As much was expressly recognised by Gleeson CJ in *Tame-Annetts*[52] and Lord Wright's often overlooked caveat 'a reasonably normal condition, *if medical evidence is capable of defining it*, would be the standard'.[53] When the issue arises at trial there would appear to be at least three different ways of a court determining the issue:

(1) by relying on medical evidence that the particular plaintiff had a special susceptibility and for that reason could not be regarded as a person of 'normal fortitude';
(2) by relying on the intuitive judgment of medical experts as to whether the particular plaintiff's reaction was that of a person of 'normal fortitude'; or
(3) through the judge's own intuitive judgment as to whether the particular plaintiff's reaction was that of a person of 'normal fortitude'.

There are difficulties with each. For example, reliance on the evidence concerning a particular plaintiff may not provide guidance concerning the existence of a duty for other cases. It might be argued that an objective approach to normal fortitude should instead depend on the reaction of a hypothetical person placed in the same circumstances as the plaintiff, which would make reference to the specific make-up of the plaintiff concerned irrelevant. As for the issue being decided by intuition, it might be pointed out that intuitive judgments are not a new thing to the law. However, that does not necessarily make it a desirable approach. Intuitive decisions may consciously or subconsciously be affected by the predilections of the judgment maker. Different views may be formed on the same facts by different judges and inconsistency may result. While at the end of the day it may be that in most cases there will be general agreement about how the mythical normal person would react, it will be the difficult cases -- such as psychiatric injury resulting from loss of a beloved pet,[54] witnessing the coffin of a loved one being overturned,[55] or being trapped in a stalled lift for a lengthy period[56] -- where the intuitive approach may be found wanting.

In a contrast with the prevailing position in England, all members of the High Court except Callinan J have rejected factors such as sudden shock and direct perception as being preconditions to recovery. Instead, these

factors were also viewed as being matters which assisted in the assessment of reasonable foreseeability and causation on the facts of the case. This would seem a sensible approach, which avoids the drawing of arbitrary and indefensible lines between otherwise equally meritorious grounds. *Gifford* is a good example of this point. Sound reasons were advanced in the High Court in justification of allowing the children to recover, including the close and loving relationship that could be presumed to exist between them and their parents, provided they could show that they had suffered the requisite measure of damage. Had the case arisen in the United Kingdom, however, it would have been summarily dismissed on the arbitrary grounds of absence of close proximity and of direct perception.

Besides the specific comments regarding claims for psychiatric injury, there were also interesting observations made by various members of the court concerning determination of a duty of care and breach of duty. In *Tame-Annetts* McHugh J made the observation, which Callinan J described as persuasive and to be 'heeded by all courts',[57] that definition of reasonable foreseeability, in terms of an undemanding 'not far-fetched or fanciful' test, and separation of foreseeability and preventability of risk at the breach stage, could explain many of the recent lower court judgments which had been criticised as being excessive. His Honour suggested that at a duty level there ought to be a return to Lord Atkin's original formulation, with emphasis placed on the reasonableness of any foreseeability. While foreseeability was a question of fact, reasonableness required a value judgment.[58] On the other hand, breach was better seen as whether the defendant knew or ought to have recognised that he or she had created an unreasonable risk, in the sense of one which reasonable members of the community would think was sufficiently great that it required preventative action.[59]

In both *Tame-Annetts* and *Gifford* Gleeson CJ also stressed the 'reasonable' aspect of reasonable foreseeability. In *Gifford* his Honour remarked: 'The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants.'[60]

There were instances of the use in the context of psychiatric injury of terminology which has become more familiar in other spheres, such as pure economic loss. In *Gifford*, Gummow and Kirby JJ noted that in attempting to define the scope of liability in negligence it was useful to identify the interests which are sufficient to attract the protection of the law in any given field, citing *Perre v Apand*.[61] Their Honours then married this proposition with a repetition of a statement they made in *Tame-Annetts* that the interest protected by Australian law was not merely 'peace of mind', as in America, but rather the plaintiff's freedom

from serious mental harm which manifests itself in a recognisable psychiatric illness. Further, they drew on the observation by Gaudron J in *Hawkins v Clayton*[62] -- that a duty to avoid economic loss might more readily be found where there was an interference with or impairment of an existing right which is known or ought to be known to the defendant, than where there is no such infringement -- to conclude that a duty to avoid psychiatric injury to the child of an initial victim would more readily be imposed where recognised rights in the initial victim are infringed.[63] Finally, their Honours saw common characteristics in the relationships in *Annetts* and *Gifford*, such as the fact that the plaintiffs had no way of protecting themselves against the risk of psychiatric harm, the fact that the defendant controlled the conditions under which the initial victim worked and held a significant if not exclusive degree of control over the risk of harm to the plaintiffs, and the lack of any inconsistency between the existence of a duty of care and the legitimate pursuit by the defendant of its business interests.[64] Hayne J, too, stressed the importance of the defendant's control of the initial victim's work conditions as an important factor in establishing a duty of care in the circumstances. These characteristics bear a close similarity to the salient features of the duty of care to avoid economic loss examined in cases like *Perre v Apand Ltd*.

5. A fractured landscape: the Ipp Report and tort reform legislation

The decision in *Tame-Annetts* was handed down shortly before a panel constituted by the Federal Government and chaired by Justice Ipp conducted a review of the law of negligence as it applied to cases of personal injury. The review was prompted by community concerns regarding massive increases in insurance premiums.[65] Under the terms of reference the panel was required to develop a 'principled' approach to reform of the common law with the 'objective of limiting liability and quantum and damages arising from personal injury and death'. However, the panel's task was made difficult by the imposition of a ridiculously short timeframe for reporting (less than two months for a preliminary report on some terms of reference deemed to be of immediate importance with a further month thereafter for the full report)[66] and an entire absence of empirical evidence from the insurance industry substantiating any assertion that the industry was in crisis. The panel indeed acknowledged that in the dearth of hard evidence, its recommendations were based:

> primarily on the collective sense of fairness of its members, informed by their knowledge and experience, by their own researches and those of the panel's secretariat and by the advice and submissions of those who have appeared before the panel and who have made written representations to it.[67]

There was no specific term of reference dealing with liability for psychiatric injury. However, there were general terms of reference related to duty of care and other elements of the negligence action in general and the panel thought it necessary to include a section on claims for mental harm. In essence, the report recommended that:

- there be no liability for mental harm unless it consisted of 'a recognised psychiatric illness' (Recommendation 34(a));
- a panel of experts be appointed to develop guidelines for assessing whether a person had suffered 'a recognised psychiatric illness' (Recommendation 33);
- there be a requirement that the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances suffer a recognised psychiatric illness if reasonable care was not taken. For these purposes, the circumstances should include whether there was a sudden shock, whether the plaintiff was present at the scene of the accident or its aftermath, whether the plaintiff witnessed the accident or its aftermath with his or her unaided senses, whether there was a pre-existing relationship between plaintiff and defendant and the nature of the relationship between the plaintiff and any person killed, injured or put in peril (Recommendation 34(b) and (c));
- the rules for a duty to arise should be the same irrespective of whether the claim is based in tort, contract, under statute or any other cause of action (Recommendation 35);
- contributory negligence on the part of the initial victim should reduce damages awarded to the secondary victim (Recommendation 36);
- the requirements of proof of a 'recognised psychiatric illness' and reasonable foreseeability of harm to a person of normal fortitude also should apply to claims for damages for economic loss for mental harm consequent upon physical injury (Recommendation 37);
- a system of accreditation of forensic psychiatric experts should be developed (Recommendation 38).

The legislative response to these recommendations has ranged from enactment of most in New South Wales to enactment of none in Queensland and the Northern Territory.

Recommendation 34 has been adopted in most jurisdictions.[68] It purports to give effect to the High Court's decision in *Tame-Annetts*, although as noted above this is not a simple matter in light of the disparity in the judgments when it came to the role and application of the notion of 'normal fortitude'. One point of distinction, however, would seem to be that the Ipp Report would elevate the matter to an essential

prerequisite, whereas strictly speaking only two members of the High Court thought that it bore this significance. To the extent that the report stipulated a catalogue of relevant circumstances to be taken into account, it suggests an objective test based on the reaction of a hypothetical person. It is important that the inclusive nature of the list be recognised, with the factors on the list judged in a qualitative rather than quantitative fashion, the weightiness of one item compensating for the lack of influence of another or others. Checking off the items in isolation and then deciding on the basis of the preponderance of affirmative or negative responses may be tantamount to treating the items on the list as prerequisites, contrary to the clear message emerging from *Tame-Annetts* and the panel's intent to restate it.

The danger inherent in a formulistic treatment of the catalogue is made more apparent when it is realised that the list was clearly drawn with secondary victim scenarios primarily in mind. There may be a temptation for a court considering a 'primary victim' case to discard those items on the list that may only be relevant in a secondary victim scenario and to then seek to apply those items remaining. Indeed, this may explain why when the recommendation was enacted in Tasmania, the catalogue of relevant circumstances was reduced to the only two which might be considered as applicable to both primary and secondary cases: whether the mental harm was suffered as a result of a sudden shock and whether or not there was a pre-existing relationship between the plaintiff and the defendant.[69] This will become problematic if this discarding process -- whether by the court or by the Tasmanian legislature -- has the effect of placing undue emphasis on these two factors, in particular the presence of a sudden shock. It is true that in denying sudden shock the status of a precondition to liability, some members of the High Court indicated that it might still be relevant to reasonable foreseeability. Such comments were unfortunate. As Windeyer J once pointed out, the law's continued use of the antiquated expression 'nervous shock' is apt to mislead.[70] Care is needed 'lest words used in one case become tyrants over the facts of another'.[71] A focus on shock by the law has its origins in an unsophisticated nineteenth century understanding of science, and is an affront to the great advances in knowledge and understanding in psychiatric medicine since that time. The need for sudden shock was described by Gummow and Kirby JJ in *Tame-Annetts* as having 'no root in principle and therefore ... arbitrary and inconsistent in application'.[72] Cases of prolonged suffering as opposed to sudden shock, as their Honours pointed out, are more appropriately dealt with as matters of causation and remoteness, not through denial of duty.[73]

It is imperative, therefore, that courts stay open to the potential influence of circumstances other than those in the catalogue, particularly those in a primary victim scenario. These might include, for example, the

plaintiff's age in a school bullying case. It would be unrealistic to judge such a plaintiff by the 'normal fortitude' of an adult.[74] Similarly, a claim by a traumatised emergency worker could not sensibly be judged against the standard of a 'normal person', for whom a car accident might be a once-in-a-lifetime event rather than a daily encounter.[75] It might even be suggested that in a multicultural society, the expectations of the plaintiff's 'normal fortitude' should, in an appropriate case, take into account what might be considered a 'normal' reaction for those of the plaintiff's cultural background.[76]

A further difficulty with recommendation 34 and the legislation based on it is the use of the term 'recognised psychiatric illness' to describe the compensable form of mental harm. Strictly speaking, this differs from the common law definition of the relevant damage, ie, *recognisable* psychiatric illness. The former denotes a condition that has been recognised as a psychiatric illness, presumably by psychiatric experts. By contrast, the latter reflects a condition that may be described as a psychiatric illness, even though there may be difficulty assigning the condition a recognised name. This is an important distinction in a dynamic field like psychiatric medicine. For example, the disorder today known as post-traumatic stress disorder first appeared as such in the third edition of the commonly-used diagnostic instrument the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III) in 1980, as a result of the wealth of research into the trauma suffered by Vietnam War combatants. The disorder, however, may be traced to a condition known as 'gross stress reaction' in the first edition of the instrument, published in 1952. For some reason, however, this category of reaction was dropped completely from the second edition. Individuals might still have suffered a condition that might have been *recognisable* as a psychiatric illness even if, strictly speaking, it was not *recognised* by the major diagnostic instrument.

The point might also be illustrated by reference to cases. In *Mt Isa Mines Ltd v Pusey*[77] the plaintiff's rare type of schizophrenic reaction to the accident was compensated, even though the doctors were unable to settle on its proper label. Similarly, in *Nader v Urban Transit Authority of New South Wales*[78] the plaintiff displayed symptoms of a condition known as Ganser Syndrome. There was disagreement in psychiatric circles as to whether this syndrome was psychotic in origin or a hysterical condition. While the symptoms did not fulfil the definition of any established recognised disorder,[79] the NSW Court of Appeal was nevertheless satisfied to regard the plaintiff's condition as constituting a psychiatric illness.

In defence of the panel, this may not have been a problem had recommendation 33 also been enacted or at least acted upon. In a sense, 'recognised psychiatric illness' is merely a label, no more or less than

'recognisable psychiatric illness'. The true significance could have rested in the detail, which could have assigned the label 'recognised psychiatric illness' the same meaning presently understood to be denoted by 'recognisable psychiatric illness'. However, this has not happened. Recommendation 33 has not been taken up by any of the legislatures. What remains is a change in the terminology and therefore possibly a change in the law.[80]

It is perhaps not surprising to discover that recommendation 37, which extends comparable provisions concerning the type of damage and normal fortitude to claims for mental harm consequent upon physical injury, has been enacted in the same jurisdictions.[81] This measure overcomes the anomaly under the common law that damages for mental harm falling short of that otherwise regarded as required, namely recognisable psychiatric illness, might be recovered where it was consequent on a physical injury, no matter how minor. Recommendation 35 suggesting that the same rules for finding duty apply, regardless of how the claim is framed has been adopted in a small number of jurisdictions;[82] while recommendation 36 proposing a change in the law, so that in a secondary victim claim the plaintiff's damages award may be reduced by contributory negligence on the part of the initial victim, has been adopted only in New South Wales.[83]

The Ipp Report considered the issue of limiting claims on the basis of direct perception or by prescribing the relationship between the plaintiff and the initial victim. However, it strongly recommended against this approach, which would be contrary to *Tame-Annetts* and, now, *Gifford*. Nevertheless, it proceeded to suggest possible relationships that might be prescribed by 'governments [which] may think that legislation enacting such a list would be desirable'.[84] A number of jurisdictions have enacted provisions that impose arbitrary limits on secondary victim claims. In the absence of any rational basis for such arbitrary restrictions, the legislatures concerned have passed laws which they might believe fairly delineates cases warranting compensation, but which significantly differ from each other.

New South Wales and Tasmania have taken a common line. In those States a plaintiff is not entitled to recover damages for pure mental harm unless the plaintiff 'witnessed, at the scene', the victim being killed, injured or put in peril, or is a close member of the family of the victim.[85] 'Close member of the family' reflects the list of relationships set out in the Ipp Report.

In South Australia there will be a renumbered provision that damages may only be awarded for 'mental or nervous shock' if the injured person was physically injured in the accident or was 'present at the scene of the accident when the accident occurred', or a parent, spouse or child of the person killed, injured or endangered in the accident.[86] Unlike the New South Wales and Tasmanian positions, there is no need for the plaintiff to actually 'witness' the accident scene, provided he or she may be said to be 'present'.

Perhaps most problematic is the new Victorian section. This provides that a plaintiff is not entitled to recover damages for pure mental harm unless the plaintiff witnessed, at the scene, the victim being killed, injured or put in danger, or 'is or was in a close relationship with the victim'.[87] No attempt is made to define 'close relationship with the victim'. The term might be seen as embracing close family relationships. However, the section says nothing about a need for the relationship to be based on love and affection. It would be wrong to assume that the phrase necessarily equated with the English 'close ties of love and affection'. It is possible to conceive of other kinds of relationships which could fairly be described as 'close', but which have no basis in love. These might include, for example, co-workers, priest and parishioner, teacher and student, mentor and mentored. Such an interpretation might commend itself as being better able to reflect modern psychiatric understanding concerning the kinds of persons who might foreseeably be psychiatrically injured as the result of the death, injury or peril of another.

The two territories have retained their versions of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW).[88] These provisions purport to 'extend' a defendant's liability for 'mental or nervous shock' to a parent, spouse or de facto partner of the victim; or another member of the family of the victim who was within the sight or hearing of the accident. As held in *Gifford* these provisions did not seek to fix definitive limits to recovery and have now been outflanked by the common law. Accordingly, in spite of these provisions, the common law is to be applied in both territories.

Queensland has seen no need to enact any legislation concerning mental harm, while Western Australia enacted some of the Ipp recommendations, but has not sought to limit the circumstances in which a secondary victim might recover. The common law in this respect therefore also governs these two States.

Some of this legislation preceded recent tort reform, while some formed part of it. The end result in any event is an Australian landscape for recovery by secondary victims which has never been so divided.

6. Conclusion

In the 1990s the House of Lords in a number of cases examined the circumstances in which damages may be recovered for psychiatric injury in both primary and secondary victim cases. The result was that in the United Kingdom, other than proof of a recognisable psychiatric illness, secondary victim claims are subject to arbitrary limits concerning the nature of the relationship between the plaintiff and the victim, the plaintiff's proximity to the accident or its aftermath and direct perception of the accident or its aftermath. There is also a need for normal fortitude and shock. On the other hand, primary victims need not even show that their reaction accorded with that of a person of normal fortitude.

The High Court has now had a similar opportunity to consider primary and secondary victim claims, but with very different results. Much was decided in the dual judgment in *Tame-Annetts*, although it transpired that *Annetts* was not as good a vehicle for examination of secondary victim claims as it was first thought to be. Nevertheless, most of the court made obiter comments on this type of claim, comments which they were able to repeat in deciding *Gifford* 10 months later. The Australian common law that emerged requires the same form of damage as the United Kingdom -- a recognisable psychiatric illness -- but otherwise rejected shock and direct perception as preconditions. Instead, a majority regarded these matters as being factors that, like the relationship between the plaintiff and the victim, are relevant to an assessment of reasonable foreseeability and/or causation in the circumstances. Less clear, however, was the appropriate treatment of normal fortitude, with a majority regarding it also as a matter relevant to reasonable foreseeability rather than being a precondition, a different majority regarding its proper role as one affecting the existence of duty, and a different majority again seeing it as a purely objective question based on the reaction of a hypothetical person, in relation to which evidence of the particular plaintiff's susceptibility is irrelevant.

Of interest were the comments by some members of the court about duty of care in general. These include indications by Gleeson CJ and McHugh J that attention should yet again return to Lord Atkin's neighbour principle. While foreseeability is an issue of fact, 'reasonable' involves a value judgment. Gummow and Kirby JJ in particular also used language previously used in relation to claims for pure economic loss, including the defendant's control over the risk of harm, a plaintiff's inability to protect himself or herself, and the absence of inconsistency between the existence of a duty and the defendant's legitimate pursuit of business interests. These comments might hold out the tantalising prospect that, despite past failures, at least some members of the court again may be thinking about a uniform approach to determining the existence of duty, or at least aspects of commonality in approaches.

Examination of the present day common law in Australia is not realistic if not done in the context of the statutory reform which has taken place in some jurisdictions. The legislation that followed the Ipp Panel's review of negligence was not uniform in the recommendations that were enacted. Moreover, there are four different legislative responses to the question of secondary victim claims. Accordingly, at a time when so much more is now known about psychiatric medicine, the law governing psychiatric claims in Australia has never been more divided.

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1 (2003) 198 ALR 100.

2 (2002) 211 CLR 317; 191 ALR 449.

3 (1984) 155 CLR 549; 54 ALR 417.

4 (1970) 125 CLR 383; [1971] ALR 253.

5 See, eg, Lord Bridge J in *McLoughlin v O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298; Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549; 54 ALR 417.

6 Commonwealth of Australia, *Review of the Law of Negligence*, Final Report, Canberra, September 2002 (the Ipp Report).

7 J Dietrich, 'Nervous shock: *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*' (2003) 11 *TLJ* 11.

8 See, eg, (2002) 211 CLR 317; 191 ALR 449 at [7] per Gleeson CJ, [44] per Gaudron J, [193] per Gummow and Kirby JJ, [261], [285] per Hayne J.

9 Ibid, at [27].

10 Ibid, at [51].

11 Ibid, at [26] per Gleeson CJ, [57] per Gaudron J, [231] per Gummow and Kirby JJ, [298] per Hayne J.

12 Ibid, at [28] per Gleeson CJ, [58] per Gaudron J, [123] per McHugh J.

13 Ibid, at [16].

14 Ibid, at [21]-[22].

15 Ibid, at [16] per Gleeson CJ, [59] per Gaudron J, [114] per McHugh J, [273] per Hayne J, [334] per Callinan J.

16 Ibid, at [189].

17 Ibid, at [296].

18 Ibid, at [109]-[118] per McHugh J, [366] per Callinan J.

19 Ibid, at [18]-[19] per Gleeson CJ, [47], [52], [66] per Gaudron J, [187] and [190] per Gummow and Kirby JJ, [267] per Hayne J.

20 Ibid, at [363] and [365] per Callinan J. McHugh J thought that the case did not call for him to state a view.

21 (1939) 62 CLR 1.

22 Ibid, at 10 per Latham CJ.

23 (2002) 211 CLR 317; 191 ALR 449 at [361]. See also, eg, [64] per Gaudron J, [305] per Hayne J.

24 See McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd*, S145/2001, S146/2001, S147/2001 (High Court Transcripts, 5 March 2002).

25 See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 617.

26 (1939) 62 CLR 1.

27 [1943] AC 92; [1942] 2 All ER 396.

28 Gleeson CJ referred to the legislative history set out in D Butler, 'Nervous Shock at Common Law and Third Party Communications: Are Australian Nervous Shock Statutes at Risk of being Outflanked?' (1996) 4 *TLJ* 120. Callinan J also noted the history of the section.

29 (2003) 198 ALR 100 at 106 per Gleeson CJ; see also at 109 per McHugh J, 122 per Gummow and Kirby JJ, 125 per Hayne J, 131 per Callinan J. This conclusion reflects views that have previously been expressed: see, eg, *Scala v Mammolitti* (1965) 114 CLR 153 at 159-60 per Taylor J (with whom Barwick CJ and Windeyer J agreed); *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 408 per Windeyer J; [1971] ALR 253; *Anderson v Liddy* (1949) 49 SR (NSW) 320 at 323 per Jordan CJ; *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1 at 7-8 per Kirby P; *FAI General Insurance Co Ltd v Lucre* (2000) 50 NSWLR 261 at 263-4 per Mason P, with whom Meagher and Giles JJA agreed.

30 (2003) 198 ALR 100 at 106 per Gleeson CJ, 111 per McHugh J, 124-5 per Gummow and Kirby JJ, 127 per Hayne J, 131 per Callinan J.

31 Ibid, at 103.

32 Ibid, at 102; see also *Tame-Annetts* (2002) 211 CLR 317; 191 ALR 449 at [9]-[12], [18].

33 (2003) 198 ALR 100 at 104.

34 Ibid, at 112.

35 Ibid, at 113.

36 (2002) 211 CLR 317; 191 ALR 449 at [225].

37 (2003) 198 ALR 100 at 114.

38 Citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251; 164 ALR 606 at 657.

39 (2003) 198 ALR 100 at 123.

40 Ibid, at 123-4.

41 (2002) 211 CLR 317; 191 ALR 449 at [285]-[296].

42 (2003) 198 ALR 100 at 126-7.

43 Ibid, at 130.

44 (2002) 211 CLR 317; 191 ALR 449 at [366].

45 Namely, *Bunyan v Jordan* (1937) 57 CLR 1; *Chester v Waverley Corporation* (1939) 62 CLR 1; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; [1971] ALR 253; *Jaensch v Coffey* (1984) 155 CLR 549; 54 ALR 417.

46 See Mason P in *Morgan v Tame* (2000) 49 NSWLR 21 at 42.

47 [1901] 2 KB 669 at 685.

48 *Bourhill v Young* [1943] AC 92 at 110 per Lord Wright, 117 per Lord Porter.

49 [1996] 1 AC 155 at 189-90, 197; [1995] 2 All ER 736.

50 (2002) 211 CLR 317; 191 ALR 449 at [201].

51 Ibid, at [189].

52 Ibid, at [16].

53 *Bourhill v Young* [1943] AC 92 at 110 (emphasis added).

54 Cf *Campbell v Animal Quarantine Station* 632 P 2d 1066 (Haw 1981).

55 Cf the difference of opinion between the Court of Appeal in *Owens v Liverpool Corporation* [1939] 1 KB 394 and Lord Wright in *Bourhill v Young* [1943] AC 92 at 110 in relation to the 'normal' reaction to seeing a loved one's coffin being disturbed in a collision.

56 Cf *Bass v Nooney* 646 SW 2d 765 (Mo 1983).

57 (2002) 211 CLR 317; 191 ALR 449 at [331].

58 Ibid, at [105]-[106].

59 Ibid, at [101].

60 (2003) 198 ALR 100 at 103.

61 (1999) 198 CLR 180 at 251; 164 ALR 606 at 657.

62 (1988) 164 CLR 539 at 594; 78 ALR 69 at 108-9. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251; 164 ALR 606 at 657.

63 (2003) 198 ALR 100 at 124.

64 Ibid, at 123-4.

65 For a discussion of the circumstances giving rise to this situation see J J Spigelman, 'Negligence and insurance premiums: Recent changes in Australian law' (2003) 11 *TLJ* 291.

66 Ipp Report, above n 6, p 33.

67 Ibid, p 32.

68 See Civil Liability Act 2002 (NSW) ss 31-32; Civil Liability Act 1936 (SA) s 53 (Recommendation (a) concerning type of damage only); Civil Liability Act 2002 (WA) ss 33-34; Civil Liability Act 2002 (Tas) ss 33-34; Civil Law (Wrongs) Act 2002 (ACT) ss 34-35.

69 Civil Liability Act 2002 (Tas) s 34.

70 *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394; [1971] ALR 253.

71 Ibid, at 400. See also *Tame-Annetts* (2002) 211 CLR 317; 191 ALR 449 at [204].

72 (2002) 211 CLR 317; 191 ALR 449 at [207].

73 Ibid, at [210].

74 Cf *Duwyn v Kaprielian* (1978) 94 DLR (3d) 424 at 439-40.

75 Cf *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 471; [1999] 1 All ER 1.

76 Cf *Coates v GIO of NSW* (1995) 36 NSWLR 1 at 12. Note that Pt 3 of the Civil Liability Act 2002 (NSW) applies to motor accidents and therefore replaces the Motor Accidents Compensation Act 1999 (NSW) s 141, which had excluded 'a normal emotional or cultural grief reaction'.

77 (1970) 125 CLR 383; [1971] ALR 253.

78 (1985) 2 NSWLR 501.

79 A syndrome is merely a collection of symptoms rather than constituting a recognised disorder.

80 This might once again be decried as allowing words to be a tyrant over the facts, but should be no less valid than deducing from the law's continued description of the relevant damage as 'nervous shock' the need for a sudden shock.

81 Civil Liability Act 2002 (NSW) ss 33; Civil Liability Act 1936 (SA) s 53 (type of damage only); Civil Liability Act 2002 (WA) s 5T; Civil Liability Act 2002 (Tas) s 35; Civil Law (Wrongs) Act 2002 (ACT) s 35(2).

82 Civil Liability Act 2002 (NSW) s 28(1); Wrongs Act 1958 (Vic) s 68; Civil Liability Act 2002 (WA) s 5R(2); Civil Liability Act 2002 (Tas) s 30.

83 Civil Liability Act 2002 (NSW) s 30(3).

84 Above n 6, p 142. The list comprised parents (or persons standing in loco parentis), spouses or domestic cohabitants, siblings (whether natural, half or step) and children (whether natural, adopted or step).

85 Civil Liability Act 2002 (NSW) s 30; Civil Liability Act 2003 (Tas) s 32.

86 Civil Liability Act 1936 (SA) s 53.

87 Wrongs Act 1958 (Vic) s 73.

88 Law Reform (Miscellaneous Provisions) Act (NT) s 25; Civil Law (Wrongs) Act 2002 (ACT) s 36.